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Supreme Court, U.S.
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No. 00-955

IN THE

Supreme Court of the United States

FREDERICK A. HURLEY AND CHRISTINE A. HURLEY,
Petitioners,

v.

MOTOR COACH INDUSTRIES, INC.
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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9 pp

REASONS FOR GRANTING THE WRIT

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Conflicts within the Circuit Courts of Appeals.

Supplemental Table of Authorities

Harris -v- Great Dane Trailers, Inc. 234 F. 3d 398 (8th Circuit, 2000)

Leipart, -v- Guardian Industries, Inc., 234 F.3d 1063 (9th Circuit. 2000)

As predicted in our Petition, two more Circuits have now ruled that when a Federal Safety Standard merely sets a *minimum* (performance standard) that state law claims are not preempted.

ARGUMENT

Both the Eighth and the Ninth Circuits has so ruled in stark contrast to the ruling of the Seventh Circuit which is the subject matter of this petition. The United State Court of Appeals for the Eighth Circuit has concluded that the Motor Vehicle Safety Standards Act and a regulation promulgated thereunder do not preempt a state law cause of action when the regulation merely sets a floor or a minimum performance standard.

In *Harris -v- Great Dane Trailers, Inc.* 234 F. 3d 398 (8th Circuit, 2000) decided December 11, 2000 the Eighth Circuit has interpreted this Court's ruling in *Geier* correctly. The standard at issue in that case was standard FMVSS 108 relating to safety standards for lamps and reflective devices on trailers. The second paragraph of the opinion at the bottom of page 399 acknowledges the ruling of this Court in *Geier* that took place during the pendency of the appeal. In its opinion the Court

acknowledges that Great Dane conceded that express preemption no longer applied but continued to insist that the plaintiff's claim that the trailer lacked reflective tape thus making its rear end visible and conspicuous at night to other motorists was still impliedly preempted. The Eighth Circuit reached its conclusion that plaintiffs' claim was not impliedly preempted strictly based upon its analysis of the Court's opinion in *Geier*. When discussing the effect of *Geier* on its opinion the Court states:

> [*Geier*]"requires careful analysis of whether a particular common law claim would conflict with, or stand as an obstacle to accomplishing the purposes of, a particular Safety Act standard, here, FMVSS 108. Under Arkansas law, the liability of the manufacturer in a products liability action is determined by whether the product was defective "at the time the product was placed on the marker" (Citations omitted).
>
> We further read Geier as strongly suggesting that a minimum federal safety standard will rarely, if ever, impliedly preempt more rigorous common law safety obligations, particularly when, as here, the governing federal statute contains a common law remedial savings clause. Justice Breyer's majority opinion expressly noted that Geier "leav[es]...state tort law to operate...where federal law creates only a floor, *i.e*, a minimum safety standard."120 S.Ct. At 1918. Justice Breyer repeated that theme in another transportation regulatory preemption case the Court decided last term: "common sense and sound policy suggest that federal minimum safety standards should not pre-empt a state tort action claiming that in the particular circumstance a

> railroad's warning device remains inadequate." Norfolk So. Ry. -v- Shanklin, 120 S. Ct. 1467, 14776 (2000) (Breyer concurring (quotation omitted; emphasis in original). Thus if the purpose of FMVSS 108 was merely to provide a minimum federal safety standard to trailer manufacturers, it does not preempt Harris's common law claim that Great Dane is liable in tort for failing to provide greater safety protection than the minimum standard required Id. 400.

This is exactly what Petitioners have been saying. Standard 208, as it relates to buses simply creates only "a floor...a minimum standard". *Geier* by its own terms is limited to automobile cases manufactured during a specific period of years and not intercity buses - ever. Petitioners claim cannot stand "as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed" *Geier* at 1925 because the phase-in *only applied to passenger vehicles* and not to buses!

Preemption in *Geier* is limited to those passenger vehicles to which the phase-in applied. The phase-in does not apply to buses. There is no conflict. The defendant makes no argument that it cannot comply with both the federal minimum standards and the "regulations" imposed by the Illinois Common-Law.

In *Leipart, -v- Guardian Industries, Inc.*, 234 F.3d 1063 (Ninth Circuit. 2000) decided December 12, 2000 the Ninth Circuit reached a similar conclusion involving its interpretation of both the pre-emption and savings clauses of the Consumer Product Safety Act. In *Leipart* plaintiff was severely injured by the glass in shower door manufactured by defendant Guardian.

The Court starts its analysis of this issue acknowledging this Court's opinion in *Geier*:

> We are assisted in our analysis by the Supreme Court's decision last Term in Geier -v- American Honda (citation omitted), rendered after the district court's decision in this case. In Geier, the Court interpreted closely analogous pre-emption and saving clauses of the National Traffic and Motor Vehicle Safety Act (NTMVSA). ..... Section 1392(d) of the NTMVSA pre-empted any state safety "standard" that was not "identical" to the federal "standard, : just as section 2075(a) does. And section 1397(k) of the NTMVSA saved common law actions even when a defendant complied with a federal safety standard" just as section 2074(a) saves common law actions when defendant complies with a federal safety "rule".
>
> The Court in Geier concluded that under the NTMVSA, a state law "standard" was not the same thing as a state common-law tort "requirement." After considering the Act's preemption and saving clauses together, the Court concluded that state requirements imposed under common-law tort actions were not "standards" within the meaning of the NTMVSA, and that such court actions were therefore not pre-empted by the text of that statute:
>
> > [A] reading of the express preemption provision that excludes common-law tort actions gives actual meaning to the saving clause's literal language, while leaving room for state tort law to operate – – for example, where federal law creates only a floor, i.e., a minimum safety standard....The language of the pre-

> emption provision permits a narrow reading that excludes common-law actions. Given the presence of the saving clause, we conclude that the preemption clause must be so read. 120 S. Ct. at 1925.

The court's textual analysis in Geier did not, however, complete its inquiry. The Court went on to consider whether a tort-based requirement conflicted with the overall scheme of the federal statute: "nothing in the language of the saving clause suggests an intent to save state-law court actions that conflict with federal regulations." Ibid. at 1919. On the facts of Geier, the Court concluded that a state common-law requirement of airbags conflicted with the policy behind the NTMVSA, which was to have a " variety and mix" of passive restraint systems, and to have a " gradual... phase-in" of passive restraints. Ibid. at 1925.

We conclude from the Court's textual analysis of the NTMVSA in Geier that analogous federal safety standards promulgated under the CPSA do not preempt state common-law requirements. See also Choate vs. Champion Home Builders Co., 222 F.3d 788 (10th Cir. 2000) (reaching the same conclusion in construing analogous provisions of National Manufactured Housing Construction and Safety Standards Act of 1974).[1] But the question remains, as in Geier, whether such common-law requirements conflict with the statute considered as a whole. Conflict preemption occurs " wherein it is impossible for a private party to comply with both state and federal requirements,... or where state

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[1] Previously cited in petitioners application.

> law " stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (Citations omitted)
>
> Guardian makes no argument in this case that it would be "impossible....to comply" both with existing federal safety standards under the CPSA and with existing requirements under California's common law of torts. The question before us is, rather, whether California's common-law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". *Leipart* at 1069

Without continuing to quote from the court's opinion, suffice it to say that the ninth circuit concluded that no such conflict existed primarily because the standards in the CPSA " created only a floor, i.e. a minimum safety standard above which state common-law or requirements were permitted to impose further duties". ID 1070. This, of course, was after concluding that the California common-law created "regulations" and not "standards" once again citing this court's opinion in *Geier* as its authority for this ruling. The court went on to conclude that "plaintiffs' common-law claims based in strict and negligent based liability for design, manufacture and distribution are not pre-empted by the CPSA". Leipart at 1070.

Applied to the facts of *Hurley* the Seventh Circuit has simply misinterpreted this Court's ruling in *Geier* to the extent that it is limited to passenger motor vehicles subject to the 1984 standard which deliberately sought to gradually phase-in of air-bags and a mix of passive restraint equipment to new **CAR** (emphasis added) fleets between the years 1986 and 1989. *Geier* at 1924

Therefore the Circuit Court of Appeals opinion must be reversed simply for its erroneous interpretation of *Geier* on two grounds:

a. *Geier's* pre-emptive effect is limited to those vehicles subject to the "phase-in"and in the absence of a "phase-in" there is nothing in this Illinois Law tort based "requirement that can possible conflict with the overall scheme of the federal statute and its regulations as promulgated by the Secretary of Transportation, and

b. *Geier* states unequivocally that where a federal standard creates a minimum or only a floor, that state law claims to quote the Eighth Circuit, "*will rarely, if ever, impliedly preempt more rigorous common law safety obligations, particularly when, as here the governing federal statute contains a common law remedial savings clause*". (Emphasis added).

CONCLUSION

Wherefore, for the reasons previously submitted, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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February, 2001